Office - Supreme Court, U.S.
FILED
APR 9 1954
HAROLD B. WILLEY, Clerk

No. 682

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

PENNSYLVANIA WATER & POWER COMPANY,
Petitioner,

against

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

ALFRED P. RAMSEY,
1707 Lexington Building,
Baltimore 2, Maryland.

HARRY N. BAETJER,
Venable, Baetjer & Howard,
1409 Mercantile Trust Building,
Baltimore 2, Maryland.

IRVIN S. WYATT,
Sullivan & Cromwell,
48 Wall Street,
New York 5, New York

Counsel for Respondent.

April 8, 1954

Byron S. Gin, Inc., 109 Worth Street, New York 13

INDEX

PAGE

Table of Citations ii

Opinions Below 4

Jurisdiction 4

Questions Presented 4

Statutes Involved 4

Statement 5

Point I—The case at bar does not involve any unsettled question of federal law nor any conflict of decisions 11

(a) The unbroken course of decision over a span of fifty years 11

(b) The *Mandeville Island Farms*, the *Kiefer-Stewart* and the *Moore* cases 14

(c) Decisions of the District Courts 17

(d) The "plain meaning" of the statute and the legislative history of the Sherman Act 18

Point II—Public policy supports the decision below .. 20

Point III—There was no repudiation of the illegal agreement such as would justify the claim for damages made herein 23

Conclusion—For the foregoing reasons, the petition for a writ of certiorari should be denied 26

Authorities Cited

DECISIONS

PAGE

Allgair v. Glenmore Distilleries Co., 91 F. Supp. 93 (S. D. N. Y. 1950) 12

Bishop v. American Preservers Co., 105 Fed. 845 (Cir. Ct. N. D. Ill. 1900) 12

Bluefields S. S. Co. v. United Fruit Co., 243 Fed. 1 (3rd Cir. 1917), writ of error dismissed on stipulation, 248 U. S. 595 (1919) 12, 13

Coppell v. Hall, 7 Wall. 542, 559 (1868) 12

Costanzo Coal Mining Co. v. Weirton Steel Co., 150 F. 2d 929 (4th Cir. 1945), cert. denied, 326 U. S. 765.. 22

Eastman Kodak Co. v. Blackmore, 277 Fed. 694 (2d Cir. 1921) 12

Eastman Kodak Co. v. Southern Photo Co., 295 Fed. 98 (5th Cir. 1923) 1

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359 (1927) 11, 13

Fanchon & Marco v. Paramount Pictures, 100 F. Supp. 84 (S. D. Cal. 1951) 18

Gilchrist v. Hatch, 183 Ind. 371, 106 N. E. 694; 1914 .. 22

Interborough News Co. v. Curtis Publishing Co., 108 F. Supp. 768 (S. D. N. Y. 1952) 18

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U. S. 211 (1951) 2, 14, 15, 16, 17

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U. S. 219 (1948) 2, 14, 15

McMullen v. Hoffman, 174 U. S. 639, 654 (1899) 19

Mid-West Theatres Co. v. Co-Operative Theatres of Michigan, Inc., 43 F. Supp. 216 (E. D. Mich. 1941) 12

Morny v. Western Union Telegraph Co., 40 F. Supp. 193, 200-201 (S. D. N. Y. 1940) 12

Moore v. Mead Service Co., 184 F. 2d 338 (10th Cir. 1950); vacated and remanded, 340 U. S. 944 (1951); on remand, 190 F. 2d 540 (1951); cert. denied, 342 U. S. 902 (1952) 2, 14, 15, 16

PAGE

Northwestern Oil Co. v. Socony-Vacuum Oil Co., 138 F. 2d 967 (7th Cir. 1943), cert. denied, 321 U. S. 792 (1944) 12, 14

Pennsylvania Water & Power Company v. Consolidated Gas Electric Light and Power Company of Baltimore, 184 F. 2d 552 (4th Cir. 1950), cert. denied, 340 U. S. 906 (1950) ..... *passim*

Pennsylvania Water & Power Company v. Consolidated Gas Electric Light and Power Company, 97 F. Supp. 952 (D. Md. 1951), affirmed, 194 F. 2d 89 (4th Cir. 1952), cert. denied, 343 U. S. 963 10

Pennsylvania Water & Power Company v. Federal Power Commission, 343 U. S. 414 (1952) 9

Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U. S. 83 (1927) 5

Red Rock Bottlers, Inc. v. Red Rock Cola Company, Civil Action No. 3892 (U. S. D. C. N. D. Ga., Jan. 16, 1953) (unreported) 18

Ring v. Spina, 148 F. 2d 647 (2d Cir. 1945) 12, 13

Singer v. A. Hollander & Son, 202 F. 2d 55, 60 (3rd Cir. 1953) 12

Tilden v. Quaker Oats, 1 F. 2d 160 (7th Cir. 1924) .. 12

Trebuhs Realty Co. v. News Syndicate, 107 F. Supp. 595 (S. D. N. Y. 1952) 18

United States v. Murtaugh, 190 F. 2d 407 (4th Cir. 1951) 21, 22

Victor Talking Machine Co. v. Kemeny, 271 Fed. 810 (3rd Cir. 1921) 12

Statutes

Clayton Antitrust Act 5

Federal Power Act 5

Sherman Antitrust Act 4

Miscellaneous

H. R. 11279, 50th Cong., 1st Sess. 19

H. R. 202, 509, 3844, 51st Cong., 1st Sess. 20

S. 6, 51st Cong., 1st Sess. 19

Williston, Contracts (Revised ed.) 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 632

PENNSYLVANIA WATER & POWER COMPANY,
Petitioner,

v.

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

The unanimous decision of the Court of Appeals for the Fourth Circuit, affirming the District Court judgment, followed an ancient, a simple and a thoroughly settled principle: if two parties are equally guilty of the same violation of law, neither can recover damages against the other. The classic maxim expressing the principle is *in pari delicto potior est conditio defendentis.* The principle is founded on a public policy to deny damages to the wrongdoer, not for the benefit of the defendant, but in order that the making of illegal bargains may be discouraged.

That the illegality of the contract in suit lay in violation of the Sherman Act does not change the general rule nor justify any review here. Over twenty-five years ago, this Court in the *Eastman Kodak* case (273 U. S. 359) held that the general rule of *in pari delicto* was applicable

to treble damage actions under the antitrust laws. The lower federal courts have consistently so held for over fifty years.

It is a significant feature of the case at bar that it was the participation of *petitioner* in the contract which made that contract illegal. There were only two parties—petitioner and respondent—to the illegal contract on which this action is founded. Respondent could not *alone* have made any "contract, combination . . . or conspiracy in restraint of trade." It was the fact of *agreement* between *petitioner* and respondent which constituted a violation of the Sherman Act.

Petitioner attempts to build up a conflict between the decision below and the decisions of this Court in the *Mandeville Island Farms* (334 U. S. 219), the *Kiefer-Stewart* (340 U. S. 211) and the *Moore* (340 U. S. 944) cases. No such conflict exists. The cited cases in this Court stand only for the proposition that it is no defense to a treble damage action for violation of the Sherman Act that plaintiff has been guilty of some *other* violation of the Sherman Act. The Court of Appeals fully accepted this proposition, but pointed out the obvious difference between the case at bar and the cited decisions of this Court: ". . . in none of them were the plaintiff and the defendant parties to the *same* illegal conspiracy or agreement on which the suit was based" (2 R. 236; italics ours).

(The complete record on which this case was decided below has not been printed, 2 R. 241. Page references herein preceded by "1 R." are to petitioner's printed appendix in the Court of Appeals; page references preceded by "2 R." are to respondent's printed appendix in the Court of Appeals, with which are incorporated the proceedings in the Court of Appeals.)

There is no conflict between the decision below and any other decision in the federal judicial system. Petitioner

does not, and cannot, point to a single case where any court has permitted recovery for violation of the Sherman Act by a plaintiff equally guilty of the *same* violation alleged against defendant. We confidently assert that no such case exists.

The petition, while claiming that "the sole issue in this case is one of law" (p. 2), nevertheless urges two matters of fact on which both the District Court and the Court of Appeals found against petitioner.

The first factual matter is the assertion that petitioner signed the illegal contract "when under domination of persons in control of Consolidated" (Petition, p. 1; petitioner does not suggest that it was ever under the domination of *respondent*). As to any claim of duress, it may be said that (a) no such claim was made below, (b) no such claim is presented by the petition (see p. 4), and (c) the Court of Appeals specifically found that petitioner "entered the agreement in the first place *voluntarily* on equal footing with Consolidated" (2 R. 239; italics ours). The Court of Appeals further specifically found (2 R. 238):

> "There was neither duress nor compulsion in the execution of the contract of June 1, 1931 between the parties to the instant suit."

The second factual matter relied on by petitioner is the contention that it timely repudiated the illegal agreement. As to this, the Court of Appeals, affirming the District Court, specifically found (2 R. 238-239):

> "The contention is not tenable under the facts of the case."

The petition presents no issue appropriate for review by this Court.

Opinions Below.

The opinion of the District Court (1 R. 1) is as yet unreported. The unanimous opinion of the Court of Appeals (2 R. 234) is reported at 209 F. 2d 131.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented.

1. May one of two equally guilty parties to a contract between them alone in violation of the Sherman Act recover from the other party damages alleged to result from the illegal contract?

2. On the facts in the case at bar, did petitioner timely repudiate the illegal contract so that it may recover treble damages even though petitioner and respondent were the only parties to the illegal contract and were equally guilty of a violation of law?

Statutes Involved.

Section 1 of the Sherman Act, as amended (15 U. S. C. § 1):

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

Section 7 of the Sherman Act (26 Stat. 210):

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit

court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Section 4 of the Clayton Act (38 Stat. 731, 15 U. S. C. § 15):

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Statement.

From 1910 until about 1938, petitioner Penn Water and respondent Consolidated were both under the control of the same financial group (2 R. 60-61). Consolidated is a larger company than Penn Water, as the latter is at some pains to emphasize (Petition, p. 5), but the difference in size is of no significance here. Control of Consolidated had been obtained by the Penn Water financial group in order to enable Penn Water to sell to Consolidated its hydro-electric power, by nature variable in amount (2 R. 60-61). There was a strong incentive for this group to favor Penn Water over Consolidated. The rates of Penn Water on sales to Consolidated were subject to no regulation, state or federal, until the passage in 1935 of Part II of the Federal Power Act (16 U. S. C. §§ 824-825); such sales to Consolidated were interstate and were not subject to state regulation under the *Attleboro* case (273 U. S. 83). On the other hand, Consolidated's rate of return was at all times subject to regulation by the Maryland Public Service Commission (2 R. 62).

Under date of June 1, 1931, Penn Water and Consolidated entered into the long-term contract (2 R. 1-14) which was filed in 1936 as Penn Water's rate schedule under the Federal Power Act and was later found to be in violation of the Sherman Act. The contract provided for delivery of power to Consolidated (2 R. 2), for payment by Consolidated of all operating expenses of Penn Water (2 R. 5), for payment by Consolidated to Penn Water of a fixed return on Penn Water's then existing plant, and for payment by Consolidated to Penn Water of a return of 10¼% (later reduced to 9½%) on any subsequent additions by Penn Water to its plant (2 R. 4-5).

Because the contract thus required Consolidated to pay the guaranteed return on any additions by Penn Water to its plant (as well as the operating costs, depreciation and taxes), the contract also required that Consolidated approve any addition on which it was to pay the return (2 R. 8).

As already mentioned, the Courts below found as a fact that the illegal contract was *voluntarily* made by Penn Water and that there was no duress or compulsion by Consolidated (2 R. 239, 1 R. 4).

Indeed, the illegal contract was for the benefit of Penn Water and for over seventeen years Penn Water received without question all the benefits of the contract, including the guaranteed high rate of return (2 R. 239).

In the autumn of 1948, however, disagreements arose between the parties over the question, among others, whether additional generating capacity needed for 1951 should be obtained by Consolidated adding a new unit or by Penn Water doing so (2 R. 200).

Consolidated invoked arbitration provisions in the contract to settle these disagreements (2 R. 136-137).

On September 28, 1948, Penn Water commenced an action in the District Court for a declaratory judgment that the arbitration provisions were unenforceable (2 R.

126-140). Penn Water did not in any way repudiate or withdraw from the contract or even mention a possible violation of the Sherman Act (see 2 R. 138-139). Penn Water was continuing to insist on Consolidated's approval under the contract of the new unit proposed by Penn Water, this in order to obligate Consolidated to pay Penn Water the contract rate of return thereon. As found in the Courts below (2 R. 235):

> "Penn Water, however, did not repudiate the agreement at this time, but continued to press its views upon the operating committee set up by the agreement."

On November 16, 1948, Penn Water, acting under the agreement as one in full force and effect and insisting on action by Consolidated under the agreement, submitted voluminous reports (2 R. 118-124) to the operating committee on the question of the needed additional capacity; at the same time Penn Water asked for further delay to submit other reports.

On November 23, 1948, Consolidated wrote (1 R. 24-25) that, because the additional capacity had to be ready by 1951, it could not delay further its own construction plans and in consequence could not approve the construction of a new plant by Penn Water for installation in 1951.

The complaint in the case at bar relies on this letter of November 23, 1948 as the violation by Consolidated of the Sherman Act giving rise to the alleged cause of action (Petition, p. 6). Whatever be the effect of the letter, it is perfectly clear that it was written *before* Penn Water had repudiated the agreement, either for violation of the Sherman Act or for any other reason.

In December 1948, however, a sudden and drastic change took place in the attitude of Penn Water toward the 1931 contract. Penn Water suddenly notified Consolidated on December 20, 1948 that it was terminating the contract

because the contract was in restraint of trade (1 R. 25-30). The next day, Penn Water filed an amended complaint in the District Court asking a declaratory judgment that the 1931 contract be nullified as in violation of the Sherman Act (2 R. 140-158).

The reason for this sudden discovery of the Sherman Act by Penn Water is not hard to find. A decision of the Federal Power Commission was just about to be handed down in a case involving Penn Water's rates and a substantial reduction in those rates was anticipated. It seems evident that Penn Water hoped, by nullifying the 1931 contract, to nullify the anticipated rate reduction and (if by nullifying the contract it could destroy the integrated interstate power pool) also to escape Federal Power Commission jurisdiction (see 2 R. 162-164).

The decision of the Federal Power Commission did come down on January 5, 1949 (8 F. P. C. 1) and it did substantially reduce Penn Water's rates.

Thereafter, it was finally decided that the 1931 contract between Penn Water and Consolidated was in violation of the Sherman Act. The reasoning was that the parties were potential competitors in the sale of electric power but that "[f]ree and unrestricted competition between the utilities is, however, impossible by reason of their contractual relations."

> *Pennsylvania Water & Power Company* v. *Consolidated Gas Electric Light and Power Company of Baltimore,* 184 F. 2d 552 at 556 (4th Cir. 1950), cert. denied, 340 U. S. 906 (1950).

Penn Water then attempted to use this decision for the very purpose by it intended—namely, to avoid the rate reduction. On certiorari in this Court from the order sustaining the Federal Power Commission rate reduction, Penn Water, as the Court of Appeals in the case at bar noted, made an argument that the Commission was without juris-

diction because "the proceeding involved . . . the continued performance of an agreement which had been declared illegal . . ." (2 R. 236).

The argument of Penn Water to escape a rate reduction because of the illegality of the agreement was rejected by this Court.

Pennsylvania Water & Power Company v. *Federal Power Commission*, 343 U. S. 414 (1952).

As Mr. Justice BLACK remarked, Penn Water "tried to utilize a violation of the Sherman Act so as to nullify a rate reduction order" (343 U. S. at 424).

This Court referred to the benefits to Penn Water from the 1931 contract and pointed to evidence "that from 1936 through 1945 Penn Water's dividends on its common stock had never been less than 25% of the cash paid in on the stock" (343 U. S. at 416).

The decision of this Court upholding the rate reduction was handed down on May 26, 1952, and within less than one month the case at bar for treble damages was commenced (2 R. 140-148).

The complaint (1 R. 9-23) proceeds on the theory that by its letter of November 23, 1948 Consolidated made impossible the construction of a new plant by Penn Water, that the new plant could not be built until the 1931 agreement was judicially declared invalid, and that the delay while this question was being litigated caused damage to Penn Water in loss of profits and because construction and financing costs meanwhile increased.

Consolidated contended below that, while admittedly it wrote the November 23, 1948 letter, it never prohibited (in the sense that it made impossible) the construction of a new plant by Penn Water; that Penn Water was free at all times to build the new plant but delayed doing so for *other* reasons than the existence of the 1931 contract; that Consolidated could not be liable for any delay due to Penn

Water's preference to obtain a judicial decision before commencing construction; and that in any event Penn Water, being equally guilty of the same violation of the Sherman Act charged to Consolidated, could not recover in the action.

Penn Water moved in the District Court for interlocutory summary judgment on the ground that the judgment in the prior contract litigation (184 F. 2d 552) was *res judicata* of every question except the amount of damages (1 R. 36-51). The District Court denied Penn Water's motion and directed entry of judgment for Consolidated because Penn Water was equally guilty of the same violation of the Sherman Act (1 R. 8). The District Judge was Honorable ALBERT V. BRYAN who had theretofore, in related litigation, dealt with a contract (the "three-party" agreement) between the parties and Safe Harbor Water Power Corporation (97 F. Supp. 952, affirmed, 194 F. 2d 89, cert. denied, 343 U. S. 963). The voluminous record before Judge BRYAN in the case at bar included the record in the earlier action in which the "two-party" 1931 contract was held invalid (2 R. 30, 89 F. Supp. 452, reversed, 184 F. 2d 552, cert. denied, 340 U. S. 906).

The judgment of the District Court was unanimously affirmed in the Court of Appeals (2 R. 240).

The opinion of the Court of Appeals dealt only with the defense of *in pari delicto*. Petitioner states (Petition, p. 1) that "all the basic allegations" in the complaint were decided in petitioner's favor, except for the defense of *in pari delicto*. This is not an accurate statement. The Court of Appeals did not decide in the case at bar whether in fact respondent had delayed construction of the new plant, nor did the Court of Appeals decide the extent of the *res judicata* effect of its earlier decision invalidating the contract. The Court of Appeals properly disposed of the case on the sole basis that petitioner was guilty of the same violation of law as respondent.

Both the Courts below found that respondent had acted properly in litigating the validity of the 1931 contract. The District Court found (1 R. 7) that the delay was "attributable to bona fide litigation of the validity of the agreement, a real and substantial controversy". This language was specifically approved by the Court of Appeals, which further noted (2 R. 239):

> "It was not practicable to discontinue and abolish this structure instantaneously and at the point of time when Penn Water became dissatisfied. The questions of law involved were not free from difficulty and were not finally concluded until there had been protracted litigation in several courts."

What petitioner has attempted in the case at bar is to penalize respondent simply because respondent exercised its right to defend the 1931 contract before the courts.

POINT I.

The case at bar does not involve any unsettled question of federal law nor any conflict of decisions.

(a) The unbroken course of decision over a span of fifty years.

The public interest does not require restatement by this Court of a rule of law which has been clearly and correctly stated and applied by the federal courts from at least 1900 to the present. The courts below were clearly correct in their application of the principle that there may be no recovery of treble damages under the antitrust laws by a plaintiff who is equally guilty of the same violation for which he sues and who has brought upon himself the damage which he alleges.

Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U. S. 359 (1927);

Singer v. *A. Hollander & Son,* 202 F. 2d 55, 60 (3d Cir. 1953);
Ring v. *Spina,* 148 F. 2d 647 (2d Cir. 1945);
Northwestern Oil Co. v. *Socony-Vacuum Oil Co.,* 138 F. 2d 967 (7th Cir. 1943), cert. denied, 321 U. S. 792 (1944);
Tilden v. *Quaker Oats,* 1 F. 2d 160 (7th Cir. 1924);
Eastman Kodak Co. v. *Blackmore,* 277 Fed. 694 (2d Cir. 1921);
Victor Talking Machine Co. v. *Kemeny,* 271 Fed. 810 (3d Cir. 1921);
Bluefields S. S. Co. v. *United Fruit Co.,* 243 Fed. 1 (3d Cir. 1917), writ of error dismissed on stipulation 248 U. S. 595 (1919);
Allgair v. *Glenmore Distilleries Co.,* 91 F. Supp. 93 (S. D. N. Y. 1950);
Mid-West Theatres Co. v. *Co-Operative Theatres of Michigan, Inc.,* 43 F. Supp. 216 (E. D. Mich. 1941);
Morny v. *Western Union Telegraph Co.,* 40 F. Supp. 193, 200-201 (S. D. N. Y. 1940);
Bishop v. *American Preservers Co.,* 105 Fed. 845 (Cir. Ct. N. D. Ill. 1900).

This Court many years ago examined the early cases and stated in a unanimous opinion:

> "The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."
>
> *Coppell* v. *Hall,* 7 Wall. 542, 559 (1868).

This Court, in an action for treble damages under the antitrust laws, approved instructions to the jury in substance as follows:

> ". . . that if, during the preceding period in which the plaintiff had been a customer of the defendant,

it had not merely bought goods from the defendant because of a business necessity, but, with a knowledge of the defendant's purpose to monopolize, had knowingly and willfully helped to build up the monopoly, it was *in pari delicto,* and hence could not recover any damages whatever on account of the defendant's refusal to continue to sell it goods."

Eastman Kodak Co. v. *Southern Photo Materials Co.,* 273 U. S. 359, 377 (1927).

The governing principle has been succinctly stated by the Second Circuit in a treble damage action under the antitrust laws:

"Where the parties stand actually and truly in pari delicto, the law should leave them where it finds them."

Ring v. *Spina,* 148 F. 2d 647 (2d Cir. 1945).

The Third Circuit has so held:

"If the Sherman Act was violated by the combination in which the Bluefields Company participated, and injury to that company was a natural consequence, then the case comes within the well settled principle that where a criminal combination is made or a criminal enterprise is undertaken by two parties and *either* party violates the agreement with injury to the other, the law will afford the injured party no redress but will leave him as it finds him. In pari delicto potior est conditio defendentis."

Bluefields S. S. Co. v. *United Fruit Co.,* 243 Fed. 1, 18 (3d Cir. 1917), writ of error dismissed on stipulation 248 U. S. 595 (1919).

The Seventh Circuit, in an action for treble damages under the antitrust laws, affirmed a judgment entered on a directed verdict for defendants. The first ground for an affirmance was failure to prove damages. The second ground for affirmance was stated as follows:

> ". . . the court would have been justified in directing a verdict upon the second ground, namely, that plaintiff participated in the illegal conspiracy. This combination was stamped with disapproval by the Supreme Court in United States v. Socony-Vacuum Oil Co., supra, 310 U. S. at page 221, 60 S. Ct. at page 843, 84 L. Ed. 1129, in these words: '• • • Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.'
>
> "Having participated in this illegal undertaking, plaintiff may not recover; where parties stand in pari delicto, the law leaves them where it finds them."
>
> *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 138 F. 2d 967, 971 (7th Cir. 1943); cert. denied, 321 U. S. 792 (1944).

(b) The *Mandeville Island Farms*, the *Kiefer-Stewart* and the *Moore* cases.

There is no substance to Penn Water's contention that a theretofore settled question of federal law was unsettled by the decisions of this Court in the *Mandeville Island Farms*, the *Kiefer-Stewart* and the *Moore* cases. The Court was not concerned in those cases with factual situations in which the litigants were equally guilty of the same violation on which the action was based.

So inapposite was the defense of *in pari delicto* in the *Mandeville Island Farms* case that this Court in its opinion did not even mention the possibility that plaintiffs might themselves be equally guilty. Indeed, defendant in *Mandeville Island Farms* did not argue in this Court that plaintiffs were *in pari delicto* and in effect conceded that the District Court had erred in holding that the plaintiffs were *in pari delicto* (Respondent's Brief in Opposition to Petition for Certiorari, p. 30; Petitioner's Brief, p. 60). The

Kiefer-Stewart and *Moore* cases are equally inapposite: this Court held that the plaintiffs were not barred because of their claimed participation in *other* conspiracies than those of which they complained.

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U. S. 219 (1948):

The action was for treble damages by growers of sugar beets against a beet sugar refiner. The claimed violation of the Sherman Act consisted of an agreement between defendant and two other beet sugar refiners to pay uniform prices to beet growers. Plaintiff growers were not parties to this agreement; indeed the agreement was directed against the growers. Plaintiff growers did not found their claim upon any illegal contract to which they were parties. The growers complained because, as this Court stated in its opinion, "*the three refiners* entered into an agreement to pay uniform prices for sugar beets" (334 U. S. at 223; italics ours).

The District Court dismissed the complaint on the ground that the alleged conspiracy did not affect interstate commerce. The District Court added that recovery was also precluded because plaintiffs "are in effect co-conspirators" (64 F. Supp. 265, 267). In affirming the judgment of the District Court, the Court of Appeals stated that it was not deciding whether plaintiffs were *in pari delicto* (159 F. 2d 71, 72).

In reversing the judgment for defendant, this Court held that the alleged restraints affected interstate commerce and hence were within the sweep of the Sherman Act. There was no mention in this Court's opinion of the doctrine of *in pari delicto* or of the possibility that the beet growers might be deemed as guilty as the refiners of the violation of the antitrust laws.

It is true that the beet growers sold their beets to defendant refiner at the uniform price fixed by defendant

refiner and its co-conspirators, but this Court nowhere indicated a view that the growers were parties to the illegal agreement among the refiners. In any event, the growers could not be *in pari delicto* with the refiners who made the illegal agreement because these refiners were the only possible purchasers of the beets grown by plaintiffs and the resulting economic coercion is clear.

Kiefer-Stewart Co. v. Joseph E. Seagram & Co., Inc., 340 U. S. 211 (1951):

Seagram and Calvert agreed not to sell liquor to plaintiff, a liquor wholesaler, unless plaintiff agreed to adhere to maximum resale prices fixed by Seagram and Calvert. Plaintiff refused to follow the maximum resale prices and defendants thereupon refused to sell to plaintiff. Defendants argued in defense to plaintiff's claim for treble damages under the Sherman Act that plaintiff had joined "other Indiana wholesalers" (340 U. S. at 214) in an illegal agreement fixing minimum prices.

In this Court on certiorari, neither plaintiff nor defendants nor the United States (appearing as *amicus curiae*) argued the defense of *in pari delicto*. Defendants' argument was that their conduct was lawful because it was motivated by plaintiff's illegal conspiracy with *other* Indiana liquor wholesalers. Defendants also argued that they did not wish to sell goods to plaintiff to be resold in violation of law. Plaintiff's reply to these arguments was that plaintiff's participation in a *separate* and *different* conspiracy could not excuse a violation of law by defendants. This Court so held.

Moore v. Meade Service Co., 340 U. S. 944 (1951):

Moore operated the only bakery in the town of Santa Rosa, New Mexico. A group of Santa Rosa businessmen, in an effort to dissuade Moore from moving his bakery out

of the community, obtained the written assurance of Santa Rosa retail outlets that they would not purchase bread from anyone but Moore. As the Court of Appeals for the Tenth Circuit later observed, this agreement was an "illegal boycott" (190 F. 2d at 541). On the day that this illegal agreement was to become effective, Meade, a competitor from a nearby town, reduced the retail price of its bread in Santa Rosa to a point well below its cost and did not reduce the price of its product elsewhere. The result was that Santa Rosa retailers continued their purchases of Meade bread.

The Court of Appeals for the Tenth Circuit affirmed the dismissal of the action which Moore had brought against Meade for treble damages based upon alleged violations of the Robinson-Patman Act (184 F. 2d 338). The ground of decision was that Moore's damages were the result of his own participation in an illegal undertaking. This Court summarily vacated the judgment of the Court of Appeals and remanded the case to that court for further consideration in the light of the *Kiefer-Stewart* decision, which had been handed down subsequent to the decision of the Court of Appeals. On remand (190 F. 2d 540, cert. denied, 342 U. S. 902), the Court of Appeals held that it was no defense to Moore's complaint against Meade's retaliatory but nevertheless illegal discriminatory prices that Moore was himself a party to *another* and *different* illegal scheme.

(c) Decisions of the District Courts.

The claimed conflict with four District Court decisions (Petition, pp. 14-16) is non-existent. In any event, we do not see any indication in this Court's Rule 38 that a conflict between a Court of Appeals decision and a District Court decision will move this Court to grant certiorari.

The facts in the four District Court decisions claimed to be "conflicting" were entirely different from those in the case at bar. There was no claim in any one of them that plaintiff and defendant were equally guilty of the *same* violation of law.

In the *Red Rock* case from the Northern District of Georgia (Petition, p. 14), there is no reported opinion but an incomplete abstract appears as Appendix B to the petition. This abstract includes a reference to some of the facts and the following quotation from the opinion (p. 2b):

> "Under these circumstances, it can not be said that the plaintiff and defendants were in equal fault . . .".

The District Court thus rejected the defense of *in pari delicto,* not because it was inapplicable in antitrust cases, but because on the facts there was no "equal fault".

There is no conflict with *Fanchon & Marco* v. *Paramount Pictures,* 100 F. Supp. 87 (S. D. Cal. 1951) because that decision specifically found:

> "There has been no violation of the antitrust laws by the defendants which has resulted in actionable injury to the plaintiff" (104 F. Supp. at 104).

There is no conflict with *Trebuhs Realty Co.* v. *News Syndicate Co.,* 107 F. Supp. 595 (S. D. N. Y. 1952), an action directed against an alleged conspiracy in the sale of newspaper advertising space. The District Court properly struck a defense that plaintiffs were parties to a wholly *separate* and *unrelated* conspiracy to monopolize the legitimate theatre industry.

There is no conflict with *Interborough News Co.* v. *Curtis Publishing Co.,* 108 F. Supp. 768 (S. D. N. Y. 1952), an action based on a refusal to sell magazines to plaintiff. The District Court properly struck the unrelated defense that plaintiff had acquired an unlawful monopoly over the wholesale distribution of magazines.

(d) The "plain meaning" of the statute and the legislative history of the Sherman Act.

The short and complete answer to Penn Water's arguments (Petition, pp. 8-10) based upon the "plain meaning"

of Section 7 of the Sherman Act and its legislative history is that the arguments come more than fifty years too late. The arguments have no more to commend them now than they did when the courts first sustained the defense of *in pari delicto* in treble damage actions in the early years of the Sherman Act.

Petitioner mistakes the "plain meaning" of Section 7 of the Sherman Act when it argues that "Any person" includes even a person who is *in pari delicto*. Such a person is injured not "by any other person or corporation", but by his own participation in the illegal scheme.

The argument is also mistaken in its assumption that Congress would not have been explicit had it intended to repudiate the great body of ancient learning inherent in the maxim *in pari delicto potior est conditio defendentis*. That body of learning was not new in 1890 and had been pithily summarized a century before by Lord Kenyon, who "would not sit to take an account between two robbers on Hounslow Heath" and whose words were quoted with approval by this Court.

> *McMullen* v. *Hoffman*, 174 U. S. 639, 654 (1899).

Petitioner appears to argue (Petition, p. 9) that Congress specifically rejected the defense of *in pari delicto* when it enacted the Sherman Act. The suggestion is startling; it has never been mentioned in any of the numerous cited decisions discussing the defense in Sherman Act treble damage cases. The argument is based on a mistake of fact as to legislative history. The bills rejected by Congress, mentioned in the petition (p. 9) and the Appendix thereto, did not involve the defense of *in pari delicto*. They involved proposed defenses going much further than the normal *in pari delicto* defense.

The most moderate of the rejected bills (*e.g.*, S. 3476, H. R. 11279, 50th Cong., 1st Sess.; S. 6, H. R. 509, 51st Cong., 1st Sess.) would have made it a defense to a treble

damage action that the plaintiff was violating the antitrust laws *in any connection,* whether or not related to the violation in suit. Others of the rejected bills (*e.g.,* H. R. 202, H. R. 3844, 51st Cong., 1st Sess.) were bills of outlawry. They would have made it unlawful for a violator of the antitrust laws to maintain *any* action of *any* kind in *any* court, federal or state. They would have cancelled the charter of any corporation which violated the antitrust laws.

The kind of defenses in the proposed bills thus rejected by Congress make it clear that there was no purpose to foreclose the normal defense based on participation of the plaintiff in the *same* violation for which he sues.

POINT II.

Public policy supports the decision below.

The petition (p. 2) suggests that the decision below is wrong because "of the public policy of the antitrust laws to encourage such suits as a deterrent to future violations".

Elsewhere in the petition (p. 2) it is said that "private considerations are out of place in an antitrust damage suit".

Petitioner attempts to invoke "the overriding public interest in enforcing these provisions as a deterrent to future violations" (Petition, p. 10).

It is stressed that the public interest is affected by the claim for treble damages (Petition, p. 16).

Respondent does not deny that private actions for treble damages under the Sherman Act do involve considerations of public policy. Respondent asserts, however, that the decision below gave full effect to public policy.

Truly, it is in the public interest to deter violations of the Sherman Act. Is this accomplished, however, by permitting a person guilty of such violations to recover damages? This Court and the lower federal courts have

for over fifty years answered in the negative. The reasoning has always been that, if a business man understands he may make an agreement in violation of the Sherman Act but may nevertheless recover treble any damages he may sustain thereby, the making of such illegal agreements is encouraged.

The most concise statement of the public policy which denies damages to a wrongdoer is that contained in Professor Williston's treatise on Contracts:

> "To deny a wrongdoer damages or the return or value of his performance, though an equally guilty defendant thereby escapes punishment and may be enriched, tends to diminish the number of illegal bargains."
>
> *Williston, Contracts* (Revised Ed.) Vol. 5, p. 4562.

The course of the several suits between Penn Water and Consolidated demonstrates that the defense of *in pari delicto* does not diminish the force of the antitrust laws. When Penn Water sought and obtained prospective relief by way of declaratory judgment, the defense was not available. Penn Water has therefore been freed by judicial action from the restraints of the illegal contract; the public interest in competition between these two utilities has already been completely expressed. It is another thing altogether to *encourage* the making of illegal bargains by awarding damages to a wrongdoer such as petitioner. It was for this reason that the courts below, which had granted declaratory relief to petitioner, withheld an award of money damages.

The cases which arise under emergency or other legislation enacted to protect a particular class (Petition, p. 18) are not in point here. An example of emergency legislation to protect a class is that relating to housing for veterans (*U. S.* v. *Murtaugh,* 190 F. 2d 407; 4th Cir. 1951;

cited in Petition, p. 18). Another example is that relating to distressed coal producers (*Costanzo Coal Mining Co.* v. *Weirton Steel Co.*, 150 F. 2d 929; 4th Cir. 1945; cert. denied, 326 U. S. 765; cited in Petition, p. 18). Examples of legislation, not necessarily inspired by emergency but to protect a special class from a special type of injury are the "Blue Sky" laws (*Gilchrist* v. *Hatch*, 183 Ind. 371, 106 N. E. 694; 1914; cited in Petition, p. 18). If a member of the protected class participates in a violation of the law, it is under compulsion of the very circumstances for which the law was enacted. The parties would not have equal guilt in such cases. As the District Court remarked in distinguishing such cases when cited by petitioner (1 R. 6):

> "No precedent is to be found in the price control cases exemplified by *U. S.* v. *Murtaugh*, 4 Cir. 190 F. 2d 407. The claimants in those cases were compelled to submit to the illegality by the very emergency which was the reason for the statute. They were *in delicto* but by not means *in pari delicto.*"

In respect of the Sherman Act, there is no special class to which Penn Water belongs but not Consolidated. So far as the antitrust laws are concerned, Penn Water and Consolidated stand as equals.

The judgment below for respondent was not based on any disregard of public policy, as suggested by the petition (p. 3), but on a studied observance of such policy. Thus, the District Court addressed itself particularly to this point (1 R. 5):

> "Legal recourse in these circumstances is not withheld in order to protect the defendant. . . . It is an efficacious means of sustaining the policy of the Congress denouncing illegal restraints in commerce. Illegal trade practices would be encouraged by permitting recovery of their losses.
>
> * * *

> ". . . the public interest is more solicitously stewarded by leaving the private parties where they find themselves. That interest is not affected by the claims for damages. . . . If the parties are left to suffer their own damages, the public is unharmed, the law is enforced, the parties are punished, but redress is still open to any third person injured by their violations. The Court believes too, that non-action would be a greater deterrent to future infractions than the entertainment of claims and counter-claims for damages."

The courts below have conformed in respect of public policy to classic teaching in general and to the teaching of this Court and of lower federal courts for over fifty years.

POINT III.

There was no repudiation of the illegal agreement such as would justify the claim for damages made herein.

The Courts below did not deny that one who repudiates and withdraws from a contract, combination or conspiracy in restraint of trade may—if such contract, combination or conspiracy continues—recover damages for illegal acts committed *after* his repudiation and withdrawal. This was the situation in the "repudiation" cases cited in the petition (pp. 19, 21). It is *not* the situation in the case at bar.

The repudiation in the case at bar came on December 20, 1948 (1 R. 25-30). This was *after* the action by respondent—the letter of November 23, 1948 (1 R. 24-25)—on account of which petitioner sued.

Moreover, on the facts of the case at bar any repudiation by petitioner would have eliminated *ipso facto* the *joint* action between it and respondent—there being only two parties to the agreement—and nothing done thereafter

by respondent could by definition be a violation of the Sherman Act.

The Court of Appeals carefully considered the contention of petitioner that it had repudiated the illegal agreement before it sustained any damages therefrom; the Court of Appeals flatly and unanimously rejected any such contention (2 R. 238, 239; italics ours):

> "The contention is not tenable under the facts of the case. Consolidated's prohibition of the erection of the new plant by Penn Water occurred during the period when both parties recognized the existence and validity of the agreement, and Penn Water's repudiation and suit for a declaratory judgment for the purpose of invalidating the agreement did not occur until *later.*"

The facts as found by the District Court was as follows (1 R. 7; italics ours):

> "The plant expansion damages in the present litigation have their source in unlawful acts committed within the period of pari delicto. The record tells no story of a locus poenitentiae in which the plaintiff reformed but thereafter fell a victim to renewed designs of Consolidated. The antitrust injury to the plaintiff—prevention of the plant expansion—was inflicted at a time, not later than November 1948, when the contracts were valid, subsisting and binding in the minds of both parties. True, the damaging effects of the injury, such as loss by reason of the delay, continued until January, 1951, the date of the avoidance of the two-party contract, but the continuation is attributable to bona fide litigation of the validity of the agreement, a real and substantial controversy. All of such damage flows directly, without supervening cause, from the original injury, the unlawful restraint imposed *before* repudiation of the agreement for its antitrust character."

The facts make it clear that there is no conflict between the case at bar and the "repudiation" cases cited in the

petition (p. 19). In all those cases the illegal scheme continued *after* the withdrawal of the plaintiff. Recovery was permitted on account of acts done by defendant *after* plaintiff's withdrawal; no recovery was permitted on account of acts done by defendant *during* the period of participation by plaintiff.

The inescapable facts show that Penn Water continued as long as possible to seek and to enjoy the benefits to it from the illegal agreement. Penn Water was attempting as late as November 1948 to obtain Consolidated's approval under the agreement of a plant addition for 1951 and thereby to impose on Consolidated responsibility under the agreement for the operating costs of the plant addition and the high rate of return thereon. This was an attempt to gain for Penn Water a selfish advantage under the terms of the illegal agreement. Only when it appeared that the benefits of the agreement might be lost through a rate reduction by the Federal Power Commission, did Penn Water for the first time question the legality of the agreement under the Sherman Act. Any damages now claimed by Penn Water are plainly the direct consequence of its own conduct in voluntarily executing and acting under the two-party illegal agreement. The District Court correctly emphasized this important point (1 R. 7):

> "The antitrust injury to the plaintiff—prevention of the plant expansion—was inflicted at a time, not later than November 1948, when the contracts were valid, subsisting and binding in the minds of both parties. True, the damaging effects of the injury, such as loss by reason of the delay, continued until January, 1951, the date of the avoidance of the two-party contract, but the continuation is attributable to bona fide litigation of the validity of the agreement, a real and substantial controversy. All of such damage flows directly, without supervening cause, from the original injury, the unlawful restraint imposed before repudiation of the agreement for its antitrust character."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALFRED P. RAMSEY,
1707 Lexington Building,
Baltimore 3, Maryland.

HARRY N. BAETJER,
Venable, Baetjer & Howard,
1409 Mercantile Trust Building,
Baltimore 2, Maryland.

INZER B. WYATT,
Sullivan & Cromwell,
48 Wall Street,
New York 5, New York

Counsel for Respondent.

April 8, 1954.